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IN THE

Supreme Court of The United States

OCTOBER TERM, 1983

No. 83-.....

IGNACIO DeLEON MARTINEZ,
JESUS CHAVARRIA GARCIA,

Petitioners,

v.

UNITED STATES ATTORNEY GENERAL
WILLIAM FRENCH SMITH ET AL
UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit exceeded its appellate jurisdiction under 28 U.S.C. § 1291 in deciding disputed questions of fact and law as to the status of the Petitioners as fugitives from justice and concurrently dismissing the Petitioners' appeals on the grounds that the Petitioners were fugitives from justice within the contemplation of *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970)?

2. Whether the Fifth Amendment due process and Sixth Amendment trial and confrontation rights of the Petitioners were violated when the Fifth Circuit dismissed the Petitioners' appeals under the rationale of *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970) without a hearing on the issue as to whether the Petitioners were fugitives from justice?

3. Whether the Fifth Circuit's dismissal upon motion by the United States of the Petitioners' appeals under the rationale of *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970), violated the principles of an equitable and just disposition of issues mandated by *Krippendorf* v. *Hyde*, 110 U.S. 276 (1884) and *Precision Instrument Mfg. Co.* v. *Automatic Machine Co.*, 324 U.S. 806 (1945), when the dismissal of the Petitioners' appeals, involving a challenge to the United States' constitutionally impermissive description of the Petitioners in accusatory pleadings in criminal cases as unindicted/uncharged participants in a bribery scheme, allowed the wrongdoings of the United States to remain unredressed and unpunished?

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IN THE

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OCTOBER TERM, 1983

No. 83-.....

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JESUS CHAVARRIA GARCIA,

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UNITED STATES ATTORNEY GENERAL
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UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully pray that a writ of certiorari be issued to review the order dismissing the Petitioners' consolidated appeals[1] to the United States Court of Appeals for the Fifth Circuit entered in such proceedings on June 16, 1983.

[1] The parties and the style of the cases on consolidated appeal to the Fifth Circuit are shown below:

No. 83-2007

IGNACIO DELEON MARTINEZ, *Applicant-Appellant*
JESUS CHAVARRIA, *Applicant-Appellant*
CRAWFORD ENTERPRISES, INC., *Defendants*

v.

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

JURISDICTION

An opinion was not rendered by the United States Court of Appeals for the Fifth Circuit in respect to the dismissal of the consolidated appeals. A copy of the Order Dismissing the Appeals and the Order Denying the Petition for Rehearing and Denying the Suggestion for Rehearing En Banc is found in the Appendix at pages 24 through 26.

The order dismissing the Petitioners' appeals was entered on June 16, 1983. A timely motion for Panel Reconsideration and a timely Suggestion for Rehearing En Banc were denied on August 22, 1983. The Petition for a Writ of Certiorari has been filed within 90 days plus the one day Sunday enlargement, as provided by 28 U.S.C. § 2101(c).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

No. 83-2008

IGNACIO DELEON MARTINEZ AND
JESUS CHAVARRIA, *Applicants-Appellants*
RUSTON GAS TURBINES, INC., *Defendant*

v.

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

No. 83-2045

IGNACIO DELEON MARTINEZ, *Plaintiff-Appellant*
JESUS CHAVARRIA, *Intervenor-Appellant*

v.

WILLIAM FRENCH SMITH, RUDOLPH W. GIULIANI,
KENNETH A. CARUSO, D. LOWELL JENSEN, ROBERT W. OGREN,
ROGER M. OLSEN, WILLIAM F. PENDERGAST,
BARBARA E. NICASTRO, *Defendants-Appellees*

No. 83-2060

IGNACIO DELEON MARTINEZ, AND
JESUS CHAVARRIA, *Applicants-Appellants*
INTERNATIONAL HARVESTER COMPANY, *Defendant*

v.

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

The Petitioners were parties in each of the four cases on appeal to the United States Court of Appeals for the Fifth Circuit. Each of the actions undertaken by the Petitioners in the District Court were civil in nature, for the Petitioners had not been charged with the commission of any crime. The primary issue in each of the cases on appeal involved the question whether the Petitioners as unindicted/uncharged persons named as participants in an alleged bribery scheme could have their names and identification by job title expunged from the:

1) Indictment filed in *United States of America* v. *Crawford Enterprises, et al* Cr. No. H-82-224 (S.D. Tex) — hereinafter referred to as the *"Crawford"* case;

2) Information and offer of proof filed in *United States of America* v. *Ruston Gas Turbines, Inc.*, Cr. No. H-82-207 (S.D. Tex); and

3) Information and offer of proof filed in *United States of America* v. *International Harvester Company*, Cr. No. H-82-244, (S.D. Tex.) hereinafter referred to as the *"Harvester"* case;

The expungement application in the *Crawford* case had been preceded by an injunction/declaratory judgment action filed on October 21, 1982 by Petitioner Ignacio DeLeon Martinez ("DeLeon") in the civil docket of the District Court for the Southern District of Texas under the style *Ignacio DeLeon Martinez* v. *United States, Attorney General William French Smith, et al*, Civ. No. H-82-3090. The expungement application in the *Harvester* case had been preceded by the simultaneous filing by DeLeon and the Petitioner Jesus Chavarria Garcia ("Chavarria") of an amended injunction/declaratory judgment action on November 18, 1982 in Civil No. H-82-3090 accompanied by Chavarria's Motion to Intervene and an injunction/declaratory judgment action in the *Harvester* case that paralleled the amended pleading filed in Civil No. H-82-3090.

The Trial Court in CR. No. H-82-3090 entered the following orders:

(1) October 27, 1982 — an order expunging DeLeon's name from the indictment in the *Crawford* case;

(2) October 29, 1982 — an order denying DeLeon's motion to expunge job title identifications of him from the indictment in the *Crawford* case;

(3) November 18, 1982 — an order denying Chavarria's motion to intervene and stating that no additional relief will be granted in this action.

The Trial Court in the *Harvester* case entered its order on December 1, 1982:

(1) Denying the Application of DeLeon and Chavarria to expunge from the Information filed November 17, 1982 references to and identifications by positions of DeLeon and Chavarria.

(2) Granted the Application of DeLeon and Chavarria to order the U.S. Attorney and Department of Justice Trial Attorneys not to include in the Offer of Proof filed in the case on November 18, 1982 any reference to and identification of DeLeon and Chavarria by position or otherwise.

If it is determined that the appeals to the Fifth Circuit are classifiable as criminal matters because they arose in connection with criminal proceedings against parties other than the Petitioners, the Petitioners have respectfully invoked the extension provisions of Rule 20.1 and applied for a 30 day extension for applying for a writ of certiorari.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

This case involves:

1) U.S. CONST. art. III, §§ 1, 2
2) U.S. CONST. amend. V
3) U.S. CONST. amend. VI
4) 28 U.S.C. and § 1254(1)
5) 28 U.S.C. § 1291
6) 28 U.S.C. § 2201
7) Title 9 of the UNITED STATES ATTORNEY'S MANUAL, § 9-11.225.

The foregoing provisions are set forth verbatim in the Appendix.

STATEMENT OF THE CASE

In the period from September 17, 1982, through November 17, 1982, in a Foreign Corrupt Practices Act ("FCPA") proceeding in California and three FCPA proceedings in Houston, Texas, in which proceedings the Petitioners were neither indicted nor charged, the Petitioners were alleged to be the intended or actual recipients of bribes totalling $9,960,432.40 in a bribery scheme allegedly developed by gas compression equipment suppliers to Petroleos Mexicanos ("Pemex"). The Petitioners were identified in the four sets of accusatory pleadings numerous times; that is, DeLeon was identified by surname 17 times, described as the Pemex official in charge of purchasing 9 times, described 10 times as "folks," a code word allegedly identifying DeLeon and Chavarria, and had 37 surname identifications of him deleted from the indictment in the *Crawford* case; and Chavarria was identified by surname 59 times, described as the Pemex official in charge of production/exploration 13 times and described 6 times by the code word "folks."

DeLeon at first, and later Chavarria, through their attorneys in oral discussions with U.S. Trial Attorneys Pendergast and

Nicastro, in an office conference with Deputy Assistant Attorney General Roger M. Olsen, and in letters to U.S. Trial Attorney Pendergast and Attorney General William French Smith unsuccessfully sought a mutual accommodation whereby the United States would cease its practice of describing DeLeon and Chavarria as participants in an alleged bribery scheme and agree to a procedure whereby prior allegations about their participation in the alleged bribery scheme would be deleted from the accusatory pleadings by the filing of mutually approved pleadings.

The Petitioners initiated two injunction/declaratory judgment actions and four expungement actions in connection with the three FCPA criminal cases filed in Texas. Partial relief was granted to the Petitioners in the injunction actions: the Trial Court in DeLeon's first injunction/declaratory judgment case ruled that the California FCPA case and the first Texas FCPA case resulted in damaging publicity in Mexico to DeLeon as a result of the extensive media coverage, which was evidenced by over 3,000 newspaper, television and radio reports about the Petitioners, so that DeLeon's name should be expunged from the indictment in the second Texas FCPA case; the Trial Court in the third Texas FCPA case ruled that the job description identifications of the Petitioners in an offer of proof must be deleted, but that the job description identifications of the Petitioners could remain in the information for the reason that the information had been filed the day before the Petitioners instituted their injunction/declaratory judgment action to expunge the references. All relief was denied to the Petitioners in the expungement cases, notwithstanding the fact that partial expungement relief had been given to DeLeon in the *Crawford* case and to both Petitioners in the *Harvester* case.

The Petitioners perfected timely appeals from the adverse decisions in the expungement actions, which appeals were consolidated by the Fifth Circuit for hearing and briefing purposes.

The Petitioners timely filed their required brief, alleging 28 U.S.C. § 1291 (Supp. 1983), as appropriate jurisdictional grounds.

On March 29, 1983, the due date of its Reply Brief, the United States filed in the Fifth Circuit a Motion to Dismiss the Appeals ("Dismissal Motion") on the ground that the Petitioners were fugitives from justice. The United States' allegations in support of the Dismissal Motion were that: 1) Mexico indicted the Petitioners for fraud and illegal association on March 9, 1983; 2) an Extradition Complaint was filed on behalf of Mexico in the U. S. District Court for the Southern District of Texas on March 25, 1983, and provisional extradition arrest warrants were issued for the Petitioners on March 25, 1983, which arrest warrants could not be executed because the Petitioners allegedly "had fled" from Sugarland, Texas.

An affidavit signed by U.S. Trial Attorney Pendergast that was attached to the Dismissal Motion stated, without any supporting proof, that (a) during the week of March 21, 1983, DeLeon and Chavarria were located in Sugarland, Texas, and (b) had fled from their residences in Sugarland, Texas on or before March 25, 1983.

DeLeon and Chavarria each owned townhomes in Sugarland, Texas, which from time to time, they or members of their family used. DeLeon's passport shows that he entered the United States from Mexico on January 8, 1983 and left the United States and entered Windsor, Canada, on March 4, 1983, and has been outside the territorial boundaries of the United States and Mexico since that date. Chavarria left Mexico and visited the United States briefly in the midpart of 1982 and then left the United States. Chavarria has not been within the territorial boundaries of the United States or Mexico since mid-summer 1982.

DeLeon did not personally occupy his Sugarland townhome after March 3, 1983. Chavarria did not occupy his Sugarland townhome after midsummer 1982, which fact was supported in

affidavits signed by Estaban Chavarria who resides in an adjacent townhome in Sugarland, Texas.

In an affidavit of Fort Bend County Deputy Terry Morgan ("Morgan") mailed to the Fifth Circuit by the United States on August 12, 1983, the United States contended that Morgan saw DeLeon on March 8, 1983 and March 24, 1983. The affidavit of Deputy Morgan did not reveal that his affidavit, in respect to the March 8, 1983 meeting, was not based upon his own independent recollection, but was based upon a recollection derived from the examination of residential security records maintained by the Homeowners Association of the subdivision in which DeLeon's home was located, which records were neither referred to nor attached to Morgan's affidavit. Access to and examination of the foregoing residential security records without a subpoena duces tecum was denied DeLeon's attorney by Fort Bend County Deputy Constable Hughes ("Hughes"), in his capacity as the Chief of Security for the Homeowner's Association. Hughes indicated that he would submit a report to U.S. Trial Attorney Pendergast and seek Pendergast's approval for DeLeon's attorney to examine the records.

The record pertaining to the extradition action against the Petitioners in the Clerk's office of the U.S. District Court for the Southern District of Texas on March 28, 1983 and at all times since March 28, 1983 contained no proof that an indictment of the Petitioners was issued in Mexico at any time. The United States did not comply with its representations to the U. S. District Court that Mexico would make a diplomatic request for the arrest of the Petitioners in conformity with the treaty and the formal papers upon which the demand for extradition was founded within 60 days.

The Dismissal Motion was granted by the Fifth Circuit, on June 16, 1983, and the Petitioners' Motions for Panel Reconsideration and Suggestion of En Banc Reconsideration of the Dismissal Order were denied on August 22, 1983.

The Petitioners' injunction/declaratory judgment actions and expungement actions were based upon the decisions in the Fifth and Ninth Circuits holding that it was a constitutionally impermissive denial of liberty and property rights guaranteed by the Fifth Amendment to the Constitution of the United States, for the United States in accusatory pleadings filed in a criminal case to name or identify a person as an unindicted co-conspirator. *United States* v. *Briggs*, 514 F.2d 450 (9th Cir. 1975); *In re Smith*, 656 F.2d 1011 (5th Cir. 1981); *United States* v. *Chadwick*, 556 F.2d 450 (9th Cir. 1977); *Application of Jordan*, 493 F.Supp. 199 (S.D.W.Va. 1977), U.S. Attorney's Manual § 9. 11-225; The expungement actions also raised the issue that the description by the United States of the Petitioners in the accusatory pleadings as intended or actual recipients of bribes totalling $9,960,432.40 constituted prosecutorial misconduct.

Department of Justice trial attorneys checked with Mexican authorities before including the names of the Petitioners in the accusatory pleadings involved in the appeals. In October, 1982 U. S. Trial Attorney William Pendergast stated that although the Petitioners could not be indicted or charged in the accusatory pleadings, the Petitioners should be punished by describing them in the accusatory pleadings involved in these cases. On May 23, 1983, U.S. trial attorneys in a hearing before Judge Cire in the lead *Crawford* case admitted that the Government did not ***have*** actual proof of monies being paid to Pemex officials, but that the Government ***felt*** that it now had proof that money ended up in a bank account of one of the Pemex officials described in the *Crawford* indictment.

REASONS FOR GRANTING THE WRIT

Review on Certiorari is merited under Rule 17.1 of the Rules of the Supreme Court. There is a constant need for this Court to review and to supervise situations where the United States and its agents intentionally and consciously violate a person's Fifth Amendment due process rights and Sixth Amendment trial and

confrontation rights. The ongoing identification of the Petitioners by surname and job title description and then only by job identification as unindicted/uncharged participants in a bribery scheme indicates a clear need for this Court to monitor legal positions that can and do oppress persons like the Petitioners. The granting by the trial courts of partial and inadequate protection for the Petitioners' constitutional rights must be supervised. The Fifth Circuit's apparent extension of its appellate jurisdiction under 28 U.S.C. § 1291 to the resolution of disputed questions of fact and law as to the status of the Petitioners as fugitives from justice needs to be contained or forcefully redirected. The Fifth Circuit, by granting the United States' Motion to Dismiss the Petitioners' appeals, has impermissibly extended its supervisory rights under Article III of the Constitution with a resultant interference with the Petitioners' Fifth and Sixth Amendment rights. The Fifth Circuit has ignored its obligations under Article III to assure fair and equitable conduct by all parties before it. If the *Molinaro* rule requires the dismissal of the Petitioners appeals, *Krippendorf* v. *Hyde*, 110 U.S. 276 (1884), *Precision Investment Mfg. Co.* v. *Automatic Machine Co.*, 324 U.S. 806 (1945), and *Keystone Driller Co.* v. *General Excavator Co.*, 290 U.S. 240 (1933), require that indignities heaped upon the Petitioners through the intentional and conscious actions of the United States be redressed and remedied in a way that is just and equitable.

ARGUMENT

I.

The Fifth Circuit does not have the jurisdiction under 28 U.S.C. § 1291 to consider disputed questions as to whether the Petitioners were fugitives from justice within the meaning of *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970), when the questions are first raised while the cases on appeal are pending before the Fifth Circuit.

The jurisdiction of the Fifth Circuit is limited by Section 1291 of Title 28 of the U.S. Code to a consideration of appeals from final decisions of district courts of the United States.

The final decisions of the District Courts that were on appeal to the Fifth Circuit involved appeals from orders denying the Petitioners' applications to expunge references to them as unindicted/uncharged participants in an alleged bribery scheme and the Petitioner Chavarria's appeal from an order denying him the right to intervene in an injunction/declaratory judgment proceeding initiated by the Petitioner DeLeon prior to the presentation and filing of the indictment in the Crawford case.

The Dismissal Motion filed by the United States with the Fifth Circuit raised for the first time on appeal the question whether the Petitioners were fugitives from justice within the contemplation of the *Molinaro* rule. The Petitioners denied the allegations as to their status as fugitives.

The Fifth Circuit had jurisdiction to hear the appeals, but it did not have jurisdiction to consider and decide the disputed questions of fact and law as to the status of the Petitioners as fugitives from provisional extradition arrest warrants or as fugitives from crimes in Mexico for two reasons: (1) these questions had not been the subject of final decisions by District Courts, and (2) a Court of Appeals cannot take judicial notice of matters not included in the record of the case in which a final decision has been entered. In particular it cannot take judicial notice

of unrecorded legal proceedings in foreign forums, which were not offered into evidence, for example, a Mexican indictment of the Petitioners, a Mexican arrest warrant, a Mexican extradition request, an affidavit of U.S. Trial Attorney Pendergast based upon hearsay information provided him. *United States* v. *Martin*, 273 F.2d 344 (2nd Cir. 1959).

After the Dismissal Motion was filed, the record before the Fifth Circuit was: (1) the records brought forward from the District Court proceedings; (2) the Dismissal Motion supported by copies of the extradition complaint filed by the United States, provisional extradition arrest warrants, and U. S. Trial Attorney Pendergast's affidavit based upon *information provided him* that the Petitioners had been in their Sugarland, Texas, townhomes in the week of March 21, 1983, and fled from those homes on or before March 25, 1983; (3) copies of pages from DeLeon's passport showing his entry into the United States on January 8, 1983, and departure from the United States and entry into Windsor, Canada on March 4, 1983; and (4) the affidavits of Estaban Chavarria, the son of the Petitioner Chavarria, that his father had not been in the United States or Mexico at any time after mid-summer 1982.

It is clear that the issue as to the fugitive status of the Petitioners was a disputed one and did not represent a final decision of a District Court.

The normal procedure for resolution of a disputed question such as the Petitioners' status as fugitives from justice would be to remand the cases to one of the District Courts, whose orders were the subject of the appeals, for a decision as to the Petitioners' status, i.e., were the Petitioners fugitives from justice? *Ruetz* v. *Lash*, 500 F. 2d 1225 (5th Cir. 1974); *United States* v. *First National City Bank*, 568 F. 2d 853 (2nd Cir. 1977); *United States* v. *Press*, 401 F. 2d 499 (3rd Cir. 1968).

The definition of a fugitive from justice is not a static one. As pointed out in *Donnell* v. *United States*, 229 F.2d 560 (5th Cir.

1956), the definition of a "fugitive from justice" in an extradition context is different from the definition in a limitations context:

> It is clear, therefore, that under extradition statutes the fact of absence at the time of the arrest is sought establishes the right of removal to the district of the crime regardless of the motive or intent behind the absence. But it is equally clear that, in determining whether a person charged with crime will be denied the right to be protected by the statute of limitations, the purpose and intent of his absence is an important matter to be inquired into by the jury under the plain words of the statute and the decision discussed.
>
> The Court below having held that appellant's absence standing alone took from him the right to have the jury consider the circumstances and intent attending his absence, its judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Id. at 565.

There was a clear conflict as to the legal significance of the Petitioners, as Mexican citizens, not being found on March 25, 1983 in townhomes owned by them in Sugarland, Texas. In view of the foregoing conflict as to the fundamental facts and the applicable law, the Fifth Circuit in the light of the limitations on its jurisdiction should have followed the principles set forth in the *Ruetz, City Bank, Press* and *Donnell* cases and directed one of the District Courts to conduct a hearing in respect to the question as to whether DeLeon or Chavarria was a fugitive from justice. The failure of the Fifth Circuit to follow such a procedure caused it to exceed its jurisdiction when it dismissed the Petitioners' appeals.

II

The Fifth Circuit's finding without a hearing that the Petitioners were fugitives from justice followed by the dismissal of their appeals violated the Petitioners' Fifth and Sixth Amendment rights just as effectively as the United States description of them,

as unindicted and uncharged participants in a bribery scheme, violated their constitutional rights.

1. *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970) reflects a principle of even-handed administration of the judicial process and is not a limitation upon the Petitioners' rights under the Fifth and Sixth Amendments.

By their terms, Article III of the Constitution and the Fifth and Sixth Amendments are co-extensive in their application to the Petitioners. The appeals before the Fifth Circuit of the denials of the Petitioners' expungement applications were adjudicable cases or controversies. The issue as to whether the Petitioners were fugitives from justice within the meaning of the *Molinaro* case was before the Fifth Circuit, but the disputed issue could only be resolved by a trial court having jurisdiction to find facts and determine the applicable law. The Fifth Circuit lacked such jurisdiction.

It is clear that the District Court cases involved the rights of the Petitioners under the Fifth and Sixth Amendments. The filing by an unindicted person of an expungement application in a criminal case bifurcates the case into one having civil and criminal aspects. The interjection of a question as to the status of the Petitioners as fugitives from justice in an expungement case that is being appealed raises questions that might impact upon the Petitioners' rights. If the issue of the Petitioners' status is resolved on the grounds that they are criminals, the Petitioners would clearly have protectible Sixth Amendment rights at both the trial court level and the appellate level if the appellate court is sitting as a court of original jurisdiction.

Even if the Fifth Circuit's lack of jurisdiction to make a decision as to the status of the Petitioners is ignored, the fact remains that the Fifth Circuit's determination without a hearing that the Petitioners were fugitives from justice and concurrent

dismissal of the appeals violated the Petitioners' Fifth Amendment due process and Sixth Amendment trial and confrontation rights.

2. The issue as to whether the appeals involved Petitioners who were not within the Fifth Circuit's control was not relevant to the question of whether the District Courts' denials of expungement relief were wrong and should be reversed.

Disentitlement to consideration of an appeal, under the *Molinaro* rule, rests upon the proposition that an Appellant who had fled during the pendency of the appeal of his criminal conviction, has removed himself from the jurisdiction and control of the appellate court and rendered the issues before the Court moot. *Smith* v. *United States*, 94 U.S. 97 (1876); *Bohanan* v. *Nebraska*, 125 U.S. 692 (1887); *Molinaro*, 396 U.S. at 366; *United States* v. *Dimas Campos-Serrano*, 404 U.S. 293 (1971); *Allen* v. *State of Georgia*, 166 U.S. 950 (1897).

The Petitioners were not defendants in any criminal actions, but were civil litigants taking appropriate legal steps to protect their constitutional rights after the United States had violated them. The Petitioners' appeals challenged the United States' actions in depriving the Petitioners of their liberty and property rights. The corrections of the injustices caused the Petitioners by the United States did not involve or require control of the persons of the Petitioners. Full effect could be given to a Fifth Circuit decision on the merits of the Petitioners' expungement applications without ever involving the Petitioners or requiring the Petitioners to do anything. The civil issue as to the entitlement of the Petitioners to have the Fifth Circuit consider their appeal should not hinge upon whether the Petitioners were physically within the jurisdiction of the Fifth Circuit. There was no matter or circumstance before the Fifth Circuit that would require the Petitioners to respond to a judgment made by the Fifth Circuit in respect to the appeals. *Smith*, *Bohanan* and *Molinaro* cases.

The issues in the appeals that were before the Fifth Circuit were whether the District Courts wrongfully denied the Petitioners' applications to expunge from accusatory pleadings the descriptions of the Petitioners as unindicted, uncharged participants in a bribery scheme that violated the Foreign Corrupt Practices Act. The appeals from the District Court denials of the expungement applications were based upon the decisions in *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1975); *In re Smith*, 656 F.2d 101 (5th Cir. 1981); *United States* v. *Chadwick*, 556 F.2d 450 (9th Cir. 1977) and the Department of Justice's policy statement in 9 UNITED STATES ATTORNEY'S MANUAL, Sec. 9-11.225. It was evident from the record that both the United States and the District Courts violated the Petitioners' Fifth and Sixth Amendment rights, and that it was these violations that were being appealed and these violations that needed to be remedied.

3. The dismissal of the Petitioners' appeals without an appropriate hearing as to the status of the Petitioners as fugitives ignored the ultimate facts and deprived the Petitioners of due process, liberty and property rights.

The facts on March 25, 1983, the date provisional extradition arrest warrants were issued for the Petitioners, were:

1. DeLeon had been living outside Mexico since January 8, 1983 and outside the United States since March 4, 1983.

2. Chavarria had been living outside Mexico and the United States since mid-summer 1982.

The Petitioners were not fugitives from justice at the time each of them left Mexico. The Petitioners were not fugitives from justice when each of them last entered the United States. The Petitioners were not fugitives from justice at the time each of them last left the United States. The Petitioners had no duty to be in the United States at the time the appeals were filed or to remain in the United States thereafter. The Petitioners had no

duty to be in the United States on March 9, 1983 (the alleged date of Mexican charge) or March 25, 1983 (extradition complaint date) or on any date thereafter. The Petitioners had left the United States prior to March 9, 1983. The Petitioners owed no duty to the United States, Mexico or any other government to remain in the United States. At the time of their respective departures from the United States the Petitioners were not charged with a crime in Mexico and were not the subject of an extradition complaint in the United States.

The Petitioners were not found in the United States. The Petitioners should not have been classified as fugitives from justice for purposes of the extradition proceeding.

In the *Molinaro* case, this Court described its position on the consideration of appeals of escaped prisoners in the following words:

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a *criminal case* after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims. (emphasis supplied).

Id. 396 U.S. at 365.

The applicability of the *Molinaro* rule to escapees, "bail jumpers" or persons taking unauthorized absence from the courts' jurisdiction is apparent. *United States* v. *Shelton*, 482 F.2d 848 (5th Cir. 1973); *Broadway* v. *City of Montgomery, Alabama*, 530 F.2d 657 (5th Cir. 1976), *United States* v. *U.S. Commanding Officer of the Provost Marshal, U.S. Army*, 496 F.2d 324 (1st Cir. 1974). The applicability of the *Molinaro* rule to civil appeals of matters that are intimately related to or intertwined with a conviction for a crime or escape from confinement has been established by the decisions in *Doyle* v. *United*

States Department of Justice, 494 F.Supp. 842 (D.C. D.C. 1980); *Conforte* v. *Commissioner*, ... U.S. ....., 103 S. Ct. 663 (1983). The limited holding of this Court in the *Molinaro* case and the fact that some courts had expanded the holding was acknowledged by Justice Rehnquist in the *Conforte* case.

> *While this Court has never extended the "fugitive from justice" rule* beyond the facts of Molinaro and Smith (i.e., *where the criminal conviction the litigant is a fugitive from is the judgment being challenged on appeal)*, the court below correctly points out that the Courts of Appeals have done so on a number of occasions. (emphasis supplied).

Id. 103 S.Ct. 663.

The genesis of the dismissal rule of the *Molinaro* case has been the proposition that a convicted appellant, by his voluntary act of removing himself from the jurisdiction of the Court, creates an unacceptable option solely within his own control; that is, the appellant acknowledges that he will subject himself to the Court's jurisdiction if the Court rules favorably on his appeal but will remain outside the Court's jurisdiction if the Court's ruling is unfavorable to him. In the case of an affirmance of the conviction the Court would be unable to enforce its judgment against the Appellant. In effect it is a *Hobson choice* that makes a mockery of the concept of an evenhanded administration of justice.

The Fifth Circuit's resolution of the question of the Petitioners' status as fugitives without a factual hearing deprived the Petitioners of:

A. Procedural due process in the form of a hearing relative to their status as fugitives;

B. The right to confront their accusers; that is, constables, U.S. Trial Attorneys, etc.;

C. A substantive consideration of the Petitioners' claim that their liberty and property rights had been violated by the actions of the United States in describing them

as unindicted/uncharged participants in a bribery scheme.

The dismissal of the Petitioners' appeals without an appropriate fact finding violated the Petitioners' rights under the Fifth and Sixth Amendments.

III

The equitable powers of the Courts of the United States to prevent abuse, oppression and injustice are adequate to fashion a protection for the Petitioners from the excesses of the United States and to protect the United States from the improprieties or defections of the Petitioners.

The cases appealed by the Petitioners to the Fifth Circuit were in fact and substance civil cases. The Petitioners had not been charged with the commission of any crime, yet, the United States engineered a strategy invoking a rule of criminal law, relying on a set of incomplete, inaccurate facts proffered by the United States to indicate wrongdoings by the Petitioners in order to deprive the Petitioners of their appeal rights.

At the time the accusatory pleadings were filed, the United States attorneys knew that an offense under the FCPA did not require proof of a completed bribe. The statements of the U.S. Trial Attorneys in May, 1983 indicated that they had not initially felt that they could prove a completed bribe and moreover were still unable to prove a bribe. Notwithstanding the foregoing state of facts, the United States went to great efforts to allege that the Petitioners accepted bribes and participated in a bribery scheme. The allegations of the United States have harmed the Petitioners' lives and destroyed their reputations in two countries. The United States did all of these things knowing that its allegations against the Petitioners were unessential to their case against the defendants in the FCPA case and knowing they had no evidence that any money or property was ever paid to Petitioners as a bribe.

The question is one of simple fairness: Is it fair that the United States and the various U.S. Trial Attorneys assigned to FCPA cases involved in the appeals be allowed to destroy two men's lives? Is it fair to let the United States intentionally violate a person's constitutional rights? Is it fair to allow the United States to insulate itself from the consequences of its own wrongs by judicial fiat? We think it is not.

At the time Chavarria left Mexico and the United States in mid-summer 1982 there was no inkling of the type of action the United States was going to take in respect to him. On November 17, 1982 the date the *Harvester* case was filed the full extent of the conscious excesses that the United States would and did take towards DeLeon and Chavarria was apparent.[2]

The record also shows the direct consequences of harm and irreconcilable inconsistencies that flowed from the actions of the United States.[3] Collectively the record chronicles the improprieties and the wrongdoings of the United States and brings into focus the question of this Court's ability to make clear to the United States and its attorney staff that: 1. In the first instance it

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[2] 76 surname identifications of the Petitioners appeared in accusatory pleadings in which the Petitioners were described but not indicted/charged as participants in an alleged bribery scheme; 22 job description identifications appeared in the same accusatory pleadings in which the Petitioners were described but not indicted/charged as participants in an alleged bribery scheme; 16 code word references were made to the Petitioners as "folks" who participated in an alleged bribery scheme without being indicted/charged with a crime in respect to such alleged participation.

[3] Over 3,000 newspaper, radio and television reports were made containing descriptions of the Petitioners as participants in an alleged bribery scheme; an order by a District Court judge expunging 37 surname identifications of DeLeon from the *Crawford* indictment and a subsequent order two days later by the same judge declining to expunge a job title description of DeLeon from the same indictment; an order by a District Court judge ordering the U.S. Trial Attorneys to delete from an Offer of Proof *job title* descriptions of the Petitioners and a second order refusing to expunge from an

is necessary that the United States and its professional trial staff understand and accept the fact that the Fifth and Sixth Amendments are alive, functioning and in a meaningful way protect the interests of the Petitioners and persons similarly situated. 2. Appellate courts of review cannot exercise jurisdiction not granted to them by statute and cannot extend or redefine a judicial rule of administration to fact situations and relationships that fall outside the principles contemplated by this Court in its supervisory role over the judicial process. The ultimate answer as to the outer limits of the *Molinaro* rule rests with this Court.

The fair and equitable administration of our judicial processes in these cases requires that the relative needs of the Petitioners and society be brought to a point of equipose. The Petitioners are convinced that the extension of the *Molinaro* rule to a point where their appeals are finally dismissed is inappropriate, but the Petitioners recognize that the outer boundaries of the rule can only be determined by this Court.

The Petitioners are equally concerned about the state of law whereby the United States and its representatives can consciously and intentionally violate the Petitioners' constitutional rights under the Fifth and Sixth Amendments and spare themselves the consequences of their acts by filing a Dismissal Motion based upon a provisional extradition warrant, which in no manner relates to the issues involved in the appeals, but which effectively defeats their constitutional rights by terminating a judicial review to ascertain whether their rights have been violated.

The gentlest description of the actions taken by the United States and its representatives in respect to the Petitioners in connection with the FCPA cases is "overzealousness"; the most

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information filed on the proceeding day the precise *job title* identifications of the Petitioners on the grounds that the Petitioners' application for injunctive relief came one day late, i.e., the information had been filed on the preceding day.

accurate description of the actions would be "conscious intentional attempts to violate the Petitioners' Fifth and Sixth Amendment rights and punish the Petitioners." Under the latter categorization of the actions of the United States, a reasonable application of the "clean hands" doctrine would have precluded the United States from urging its Dismissal Motion.

If it is clear that dismissal of the appeals was required, in an equitable context it is equally as important that the United States not be allowed to "get off Scot Free". In the event that the *Molinaro* rule governs the appeals the Petitioners suggest that the remedy that should be fashioned by this Court should meet the needs of the Petitioners, the Government and society as a whole and should be in the mold of this Court's definition of its equitable powers in the *Krippendorf* case, when it said "So the equitable power of courts of law over their own process to prevent abuse, oppression and injustice is inherent . . ." 110 U.S. at 283.

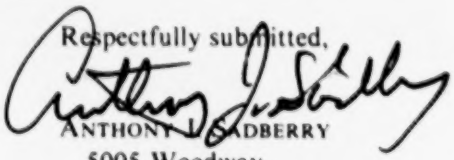
The Petitioners suggest that the proper equitable remedy would be the issuance by this Court of instructions to the Fifth Circuit in the following vein:

> The cases are remanded to the Fifth Circuit with instructions that the Fifth Circuit shall ascertain whether the Petitioners' constitutional rights were violated, and, if they were violated, the identifications of the Petitioners should not be expunged from the accusatory pleadings, but there shall be entered into the record in the respective cases a clear statement that the constitutional rights of the Petitioners were violated by the inclusion in the pleadings, of identifications of the Petitioners as participants in a bribery scheme and, stating that the identifications of the Petitioners were not expunged from the pleadings for the reason that the Petitioners were fugitives from provisional extradition arrest warrants.

The lack of jurisdiction by the Fifth Circuit to make the fugitive from justice determination that it did make, the inappropriateness of extending the *Molinaro* rule to the Petitioners' appeals, and the unwholesomeness of allowing the United States' violations of the Petitioners' constitutional rights to remain unredressed emphasize the need for and the soundness of having a writ of certiorari issue to review the order dismissing the Petitioners' appeals that was issued by the United States Court of Appeals for the Fifth Circuit on June 16, 1983.

DATED November 18, 1983.

Respectfully submitted,



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APPENDIX

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 83-2007, 83-2008
83-2045 & 83-2060

UNITED STATES OF AMERICA
Plaintiff-Appellee,

VERSUS

CRAWFORD ENTERPRISES, INC., *et al.*,
Defendants,

JESUS CHAVARRIA AND IGNACIO DELEON MARTINEZ,
Applicants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion for leave to file supplemental response to appellee's motion to dismiss is granted.

IT IS FURTHER ORDERED that the motion of appellee to dismiss the appeal is granted.

IT IS FURTHER ORDERED that appellants' motion to supplement the record on appeal is granted.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 83-2007, 83-2008,
83-2045 & 83-2060

UNITED STATES OF AMERICA
Plaintiff-Appellee,

VERSUS

CRAWFORD ENTERPRISES, INC., *et al.*,
Defendants,

JESUS CHAVARRIA AND IGNACIO DELEON MARTINEZ,
Applicants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 16, 5 Cir., 1983, ... F.2d . . . .).

(August 22, 1983)

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal; Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

. . . . . .

CHIEF JUDGE

U. S. CONST., art. III § 1 and 2.

Article III. *The Judiciary*

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

U. S. CONST., amend. V.

AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION: DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. CONST., amend. VI.

AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. Section 1254(1):

SECTION 1254. COURT OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. Section 1291 (Supp. 1983):

SECTION 1291. FINAL DECISIONS OF DISTRICT COURTS

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title. As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.

28 U.S.C. 2101(c)

SUPREME COURT; TIME FOR APPEAL OR CERTIORARI; DOCKETING; STAY

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be

taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S.C. Section 2201:

SECTION 2201. CREATION OF REMEDY

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Title 9 of the United States Attorney's Manual.

"9-11.225 *Limitation on Naming Persons Unindicted Co-conspirators*

The practice of naming individuals as unindicted co-conspirators in an indictment charging a criminal conspiracy has been severly criticized in *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1974), and other cases. In granting appellants' motion for an order of expungement in *Briggs*, the Court of Appeals held that, in charging them with criminal conduct without indicting them, the grand jury exceeded its powers and authority and that its action was a denial of due process to appellants since it deprived them of an opportunity to challenge the correctness of the grand jury's accusation. See also *United States* v. *Chadwick*, 556 F.2d 450 (9th Cir. 1977); *Application of Jordan*, 439 F. Supp. 199 (S.D.W.Va. 1977); *United States* v. *Hansen*, 422 F. Supp. 430 (E.D. Wis. 1976).

"Primarily on the basis of *Briggs*, the American Bar Association has recently adopted as part of its policy on the

grand jury, the following statement of principle. "The grand jury shall not name a person in an indictment as an unindicted co-conspirator in a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars: (Principle 7 of 25 principles).

"The Department did not oppose the Adoption of this Principle by the ABA and generally concurs in it. As the court in *Briggs* pointed out, there is no need ordinarily to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty. For purposes of indictment itself, it is sufficient, for example, to allege that the defendant conspired with "another person or persons known." The identity of the person can be supplied, upon request, in a bill of particulars. With respect to the trial, the person's identity and status as a co-conspirator can be established, for evidentiary purposes, through the introduction of proof sufficient to invoke the co-conspirator hearsay exception without subjecting the person to the burden of a formal accusation by a grand jury.

"Accordingly, in the absence of some sound reason (e.g., where the fact of the person's conspiratorial involvement is a matter of public record or knowledge), it is not desirable for United States Attorneys to identify unindicted co-conspirators in conspiracy indictment."